No. 459

IN THE

Supreme Court of the United States

OCTOBER TERM—1945

ETHEL KRESBERG,

Petitioner,

—against—

INTERNATIONAL PAPER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOSEPH NEMEROV,
Counsel for Petitioner.

EDWARD A. ROTHENBERG,
AARON SCHWARTZ,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM—1945

No.

ETHEL KRESBERG,

Petitioner,

—against—

INTERNATIONAL PAPER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Ethel Kresberg, respectfully prays that a Writ of Certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on June 28, 1945, affirming an order and judgment of the United States District Court for the Southern District of New York (R. 118-123), which dismissed the complaint of the petitioner against the respondent on jurisdictional grounds.

Statement of Matter Involved.

This action was instituted in the District Court for the Southern District of New York by petitioner, the owner and holder of $5,000. in principal amount of debentures payable

to bearer and made by International Hydro Electric System (hereinafter called Hydro). Said debentures were part of an issue sold to the public in 1929, and were acquired by petitioner by purchase in the open market prior to their maturity. Approximately $25,000,000. in principal amount of said debentures are presently outstanding and matured as to principal on April 1, 1944. Hydro was unable to pay the principal amount of said debentures at their maturity date, and they remained unpaid at the time of suit. Petitioner brings this action on her own behalf and in behalf of all others similarly situated, and seeks to have the respondent International Paper Company (hereinafter called "Paper") adjudged liable for the payment of the principal amount represented by said debentures, under the "instrumentality rule", upon the ground that Hydro was created by Paper as its vehicle and tool, expressly for the purpose of raising moneys by ulterior means, for its own use and purposes, through the sale of the aforesaid debentures (R. 7-53).

The sole question involved herein is a jurisdictional one. Therefore, it is not necessary to give a detailed recitation of the facts upon which the substantive liability of the respondent is based.

There is a diversity of citizenship between petitioner and respondent. Petitioner is a citizen of Florida and respondent is a corporation organized and existing under the laws of the State of New York. It maintains an office in that state within the Southern District (R. 9-10). The debentures involved in this suit are bearer instruments which she owns and holds as a subsequent holder (R. 61). No diversity of citizenship was shown between the original holder or petitioner's predecessor and the defendant.

Hydro was organized in Massachusetts and is commonly known as a Massachusetts trust. While not chartered as a corporation, it has a statutory status as an "association"

(R. 9), which is recognized by the Courts and the Legislature in that state as a quasi-corporation and is generally considered as a corporation. It was created pursuant to a common law declaration of trust under which it possesses practically all of the rights, powers, attributes and characteristics of a chartered corporation (R. 90-95).

In addition to having an artificial name, by-laws and a seal, it has an elected board of directors (except that the first board was designated by the trustees). This board has and exercises broad powers much like those of the board of directors of a chartered corporation (R. 90-91).

Hydro has shareholders who own the beneficial interest in the trust estate, represented by shares of different classes, which like those of a chartered corporation, have different rights, privileges, and preferences in respect to dividends and to payment in distribution upon dissolution and liquidation (R. 92).

Dividends are declared on the shares by the board of directors, as dividends are declared on corporate stock. Some of the shares carry voting rights and certain actions can be taken only after a prescribed number of shares have so voted. An office must be maintained for the transfer of Hydro's shares and annual meetings of shareholders are held (R. 92-94).

Neither the directors, the trustees nor the shareholders have any personal liability (R. 91).

Hydro does not cease to exist upon the death of any trustee, director, or shareholder (R. 94).

Pursuant to Chapter 182 of the Laws of Massachusetts, Hydro has filed a copy of its declaration of trust with the Massachusetts Commissioner of Corporations (R. 97-98), and it may sue (R. 95) and be sued in its own name and its property is subject to attachment and execution (R. 96-97).

Hydro has been financed by the sale of its shares and debentures to the purchasing public through underwriters

(R. 42-43), and its board of directors issues an annual report similar to that customarily issued by a corporate board of directors (R. 98).

Moreover, Hydro's debentures, including the debentures involved herein, are publicly traded on the New York Stock Exchange, and were so acquired by petitioner (R. 61-62).

Respondent does not contend that said debentures were assigned to petitioner for the purpose of conferring jurisdiction on the District Court.

The respondent moved for an order and judgment dismissing the complaint solely on the ground that the jurisdictional requirements of Section 24 (1) of the Judicial Code (28 U. S. C. 41 (1)) had not been met by petitioner and that therefore the District Court lacked jurisdiction over the subject matter of the action (R. 55-57). The District Court granted the motion and the Circuit Court of Appeals, Second Circuit, affirmed.

Statement of the Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347 (a)).

The date of the decree sought to be reviewed herein is June 28, 1945. This petition is presented on or before September 28, 1945.

The statute of the United States involved is 28 U. S. C. A. Sec. 41 (1); Jud. Code, Sec. 24 (1), the pertinent provisions of which are as follows:

> "No district Court shall have cognizance of any suit * * * to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover

upon said note or other chose in action if no assignment had been made."

Question Presented.

Whether a quasi-corporation which possesses the essential characteristics of a chartered corporation to such a degree that it is generally considered a corporation, comes within the purview of the term "any corporation" as used in Section 24 (1) of the Judicial Code, 28 U. S. C. A. Sec. 41 (1), wherein said term is not expressly defined.

Rulings of the Courts Below.

The District Court determined the above question in the negative. It granted the motion to dismiss by an order dated August 8, 1944 and a judgment was entered on August 10, 1944 (R. 118-123). Its opinion is not reported but appears at pages 35-39 of the record.

The Circuit Court of Appeals also determined the above question in the negative and affirmed by decree entered June 28, 1945. Its opinion is reported in 149 F. 2d 911 and is contained in the appendix herein.

Reasons for Allowance of Writ.

A review of the writ of certiorari should be granted herein, as a matter of sound judicial discretion, for one or more of the following special and important reasons:

1. The Circuit Court of Appeals held that although Hydro is a quasi-corporation and possesses the essential characteristics of a chartered corporation to such a degree that it is generally considered a corporation, it does not come within the purview of the term "any corporation", as used in Section 24 (1) of the Judicial Code, 28 U. S. C. A. Sec. 4 (1). Said decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Scott*

County, Ark. v. *Advance-Rumley Thresher Co.*, 288 Fed. 739, that a quasi-corporation (in that case a county) is encompassed by said term. It is also in conflict with the decision of the Circuit Court of Appeals, Sixth Circuit, in *Bloomfield Village Drain District* v. *Keefe*, 119 F. (2d) 157, wherein it was held that a body (in that case a drain district) which exhibits the essential characteristics of a corporation, although not specifically designated as such by statute, falls within the term "any corporation", as provided in Section 24 (1) of the Judicial Code.

2. The aforesaid decision of the Circuit Court of Appeals pertains to an important question as to the construction of the aforesaid federal statute involving the jurisdiction of the federal district courts, which question of federal law has not been, but should be, settled by this Court.

The question involved herein is substantial. The courts have recognized that organizations of the type of Hydro have come to occupy a large field in industry and in finance. Consequently, this Court, as a court of last resort, should definitely and finally determine the increasingly important question presented herein.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

September 24, 1945.

ETHEL KRESBERG,
Petitioner.

By

JOSEPH NEMEROV,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No.

ETHEL KRESBERG,

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—against—

INTERNATIONAL PAPER COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below.

A statement as to the opinions below appears in the petition, at page 5.

Jurisdiction.

A statement as to jurisdiction appears in the petition, at pages 4-5.

The Facts.

A statement of the facts appears in the petition, at pages 1-4.

ARGUMENT

I.

The holding of the Circuit Court of Appeals that a quasi corporation does not come within the term "any corporation", in Section 24(1) of the Judicial Code, is in judicial conflict with the decisions of the Circuit Courts of Appeals, Eighth Circuit, in *Scott County, Arkansas* v. *Advance-Rumley Thresher Co.*, 288 Fed. 739, and Sixth Circuit, in *Bloomfield Village Drain District* v. *Keefe*, 119 F. (2nd) 157.

The Circuit Court of Appeals (Appendix, p. 19), as well as the District Court (R. 110), held that Hydro is a quasi corporation. The Circuit Court of Appeals (Appendix, p. 18) recognized that Hydro possesses nearly all of the rights, powers, attributes and characteristics of a chartered corporation. These are set forth in its opinion (Appendix, p. 18) and in the factual statement herein, and include the fact that Hydro "may sue and be sued in its own name and its property is subject to attachment and execution."

The Circuit Court of Appeals also took cognizance (Appendix, p. 19) of the fact that judicial authorities support petitioner's position that Hydro is to be generally considered a corporation.

Moreover, it held (Appendix, p. 20) that there was much force in the argument that since Hydro issued its securities, including its debentures, in the same way as a chartered corporation, and since such securities are widely purchased and sold in the public markets, Hydro should be held to be a corporation in suits on such securities.

Despite the foregoing, the Circuit Court of Appeals held (Appendix, p. 20) that in giving effect to the rule that federal jurisdiction is not to be extended beyond the scope

permitted by a strict construction of the statute upon which it rests, the term "any corporation" as provided in Section 24 (1) of the Judicial Code, does not encompass a quasi corporation. This argument was the sole ground advanced by the Circuit Court of Appeals in support of its conclusion.

The holding of the Second Circuit is in conflict with the decisions of the Eighth Circuit and the Sixth Circuit, *supra*.

In the Eighth Circuit case, *supra*, the Court held that a county, although not a chartered corporation, could, nevertheless, be regarded as a public corporation *or* a quasi corporation and on *either* basis was a "corporation" within the purview of Section 24 (1) of the Judicial Code.

The body before the court in the Sixth Circuit case, *supra*, was a Michigan drain district which, like a county, was not chartered. Moreover, it was not denominated a corporation in the state constitution or statutes. The rationale of the court was that since the entity had the essential characteristics of a corporation, it came within the term "any corporation" in Section 24 (1) of the Judicial Code.

The Second Circuit refused to admit that the foregoing decisions of the Sixth and Eighth Circuits were in conflict with its decision, but instead, sought to reconcile them by treating the entities in those cases as "public corporations". It wholly ignored the fact that while those entities happened to perform public functions, they were not chartered corporations, but quasi corporations possessing the essential characteristics of a corporation.

The decisions of the Eighth and Sixth Circuits clearly indicate that the entities therein were not held to be encompassed within the term "any corporation" merely because they performed public functions. More accurately speaking, both of such entities were public quasi corporations, as distinguished from a public chartered body such as a municipal corporation. This distinction was recognized by the Eighth

and Sixth Circuits and is commented upon with particularity at page 161 of the opinion of the Sixth Circuit.

There was never any doubt that a private chartered corporation was encompassed by the term "any corporation". The dispute first arose as to whether a public chartered corporation, such as a municipality, was also included within the purport of said term. This was resolved in the affirmative by this Court in *Loeb* v. *Trustees of Columbia Tp.,* 179 U. S. 472, 21 S. Ct. 174, 45 L. Ed. 280.

It is clear that the decisions of the Eighth and Sixth Circuits, *supra,* served to extend the principle of the *Loeb* case, *supra,* to non-chartered entities which were, nevertheless held to be "corporations" because they exhibited the essential characteristics of such a body and accordingly could be regarded as quasi corporations.

If the irreconcilable holding of the Second Circuit is permitted to stand, the following anomalous situation would exist: both a chartered and a quasi corporation which perform public functions would come within the term "any corporation"; whereas, although a chartered corporation which performs private functions would fall within said term, a quasi corporation which performs like functions would not.

It is, therefore, essential, that this Court determine the question involved herein and, particularly, whether the criteria laid down by the Eighth and Sixth Circuits and ignored by the Second Circuit, should be the true test to be applied in determining whether a body, exercising public or private functions, is encompassed within the term "any corporation".

In the light of the decisions of the Eighth and Sixth Circuits, *supra,* as well as the decision of this Court in the *Loeb* case, *supra,* it must be perceived that proper application of the principle of strict construction in this case did

not require a result which is contrary to the intention of Congress. Such legislative intent is indicated by its use of the words "any corporation", instead of the words "a corporation", obviously because the former has a wider and more comprehensive scope. The word "any" is defined in Webster's Universal Unabridged Dictionary as "one of three or more, which one not specified".

The amendment to the Judiciary Act of 1887 which put the words "any corporation" into the statute for the first time, was enacted subsequent to the decision of this Court in *Liverpool and London Life Insurance Company* v. *Oliver,* 10 Wall. 566, 19 L. Ed. 1029, affirming 100 Mass. 531, wherein it was held that a voluntary business association operating in the State of Massachusetts, a jurisdiction foreign to the one in which it was created, could be taxed as a corporation in that state. So holding, this Court said at page 1033:

> "We have no hesitancy in holding that, as the law of corporations is understood in this country, the Association is a Corporation * * *"

It is reasonable to assume that Congress was cognizant of the aforesaid ruling of this Court when it used the broad term "any corporation", intending thereby to encompass non-chartered entities which should be regarded as corporations.

The Second Circuit attempts to explain away the holding of this Court in the *Liverpool* case, *supra,* by saying that the language was directed to the issue presented and decided in that case. While we do not quarrel with this statement, it is no answer to petitioner's contention that Congress used the broad term "any corporation" in the light of the previously existing judicial pronouncement of this Court.

The Second Circuit also sought to reinforce its decision by commenting (Appendix, p. 21) on the fact that in

other federal statutes the term "corporation" is expressly defined to include quasi corporate bodies. However, no significance can be placed on said fact, because all of the statutes referred to were enacted considerably after the amendment of the Judicial Code in 1887, which it must be remembered had no specific definition of the term "any corporation". Obviously, Congress intended to leave this broad term to judicial construction. Its failure to include a specific definition in subsequent amendments of the section undoubtedly stemmed from its satisfaction with the construction placed upon said term by the Circuit Courts, which encompassed quasi corporations, as well as chartered corporations, within said term. (See *Scott* case, *supra,* and *Bloomfield* case, *supra,* which were respectively decided before and after the last amendment of 1940.)

It is also to be noted that the Sixth Circuit in the *Bloomfield* case, *supra,* and the highest court in the State of Massachusetts in *State Street Trust Company* v. *Hall,* 311 Mass. 299, held that in determining whether a body constituted a corporation, no special significance could be attached to the fact that there was no specific definition of the term so as to include the body in question.

The Second Circuit seeks to shunt aside the *State Street* case, *supra,* and some of the other cases cited by the petitioner for the proposition that voluntary associations, such as Hydro, are to be considered as corporations, by stating that such cases are not decisive on the question of federal jurisdiction. The Second Circuit even fails to mention two of the cases cited by petitioner. The first was *Mulloney* v. *United States,* 79 Fed. (2nd) 566, in which the Circuit Court of Appeals, First Circuit, in affirming the District Court of Massachusetts, 8 Fed. Supp. 674, held that since a Massachusetts association or business trust, such as Hydro, had practically all of the attributes of a corporation, it was to be treated as a corporation for the purpose of determining

whether it was privileged from producing books and papers before the Grand Jury in a criminal action.

The second case ignored by the Second Circuit was *Byrne* v. *American Foreign Association,* 3 F. R. D. 1, where the District Court of Massachusetts held that since a Massachusetts association or business trust had practically all of the attributes of a corporation, it should be dealt with as such for the purpose of determining whether it was subject to service of process.

Moreover, the Second Circuit made only a passing comment with respect to the most recent decision of the highest court of the State of Massachusetts in the *State Street* case, *supra,* to the effect that a Massachusetts association or business trust is to be generally considered a corporation.

The Second Circuit fell into the error of giving absolutely no weight to any of the foregoing cases. This is contrary to the reasoning of this Court in the *Loeb* case, *supra,* and to that of the Eighth Circuit in the *Scott* case, *supra,* in which said courts gave due cognizance to the fact that the bodies in question were considered as corporations for general purposes, in their respective states of organization. Moreover, the Sixth Circuit in the *Bloomfield* case commented (at p. 161) on the fact that it lacked "the authoritative guidance of the State courts".

This Court, in the *Loeb* case, *supra,* also stressed (p. 486 of U. S.) the fact that under the laws of the state of its creation, the entity had authority to sue in its own name. Although the Second Circuit noted in its opinion (Appendix, p. 18) that Hydro "may sue and be sued in its own name and its property is subject to attachment and execution", it, unlike this Court, chose to place absolutely no significance on that fact.

There can be no doubt that the Second Circuit approached the problem before it in a manner which is the direct antithesis of the rationale of this Court in the *Loeb* case,

supra, adhered to by the Eighth and Sixth Circuits. Accordingly, it reached a result which it concedes (Appendix, p. 19) has strong policy argument against it.

By the amendment of 1887, Congress apparently intended that the federal courts should not be cluttered with a mass of suits arising out of instruments made by individuals, which are generally of a local character. On the other hand, Congress evidently deemed it wise that the federal courts continue to have jurisdiction over suits involving bonds, debentures, notes, etc. which are generally bought and sold by the public in the open market places throughout the nation.

Inasmuch as Hydro's debentures were issued and publicly traded in the same manner as those of a chartered corporation, no logical reason could have been or was advanced for making any distinction between them. In any event, the ruling of the Second Circuit is directly in conflict with the decisions of the Eighth and Sixth Circuits, which petitioner respectfully submits correctly construe Section 24 (1) in the light of the true intention of Congress.

II.

The decision of the Circuit Court of Appeals pertains to an important question as to the construction of a federal statute involving jurisdiction of the federal district courts, which question of federal law has not been, but should be, settled by this Court.

Questions involving the jurisdiction of the federal district courts are generally of vital interest to this Court. This Court indicated its concern as to the construction of the particular section involved herein when it granted certiorari in the *Loeb* case, *supra.* There, it held that a municipal corporation, a chartered body, came within the term "any corporation" in Section 24 (1) of the Judicial Code. In

Point I hereof, we have shown that the different Circuit Courts have not uniformly applied the general principles laid down by this Court in the *Loeb* case, *supra,* to quasi corporations which possess practically all of the attributes of a chartered entity.

The Circuit Court of Appeals, First Circuit, in *Malley* v. *Howard,* 281 Fed. 363, affirmed 265 U. S. 144, in treating with a Massachusetts business trust for tax purposes, said at page 370:

> "It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance * * * "

There can be no doubt that the question involved herein will arise with increasing frequency. This Court of last resort should finally resolve the conflict existing between the different circuits on this important question of federal law.

CONCLUSION.

The holding of the Circuit Court of Appeals herein is in conflict with the decisions of the Eighth and Sixth Circuits. Unless the errors in the instant holding be corrected by this Court, considerable confusion will continue to result regarding the construction of a federal statute involving the jurisdiction of the federal district courts. The important question of federal law involved herein has not been, but should be, definitely settled by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH NEMEROV,
Counsel for Petitioner.

EDWARD A. ROTHENBERG,
AARON SCHWARTZ,
Of Counsel,

APPENDIX.

CHASE, *Circuit Judge*:

The appeal is by the plaintiff from an order dismissing her complaint in a suit she brought in the District Court for the Southern District of New York to recover from the defendant the principal and interest due on five one thousand dollar six per cent debenture bonds issued by the International Hydro-Electric System. The suit was brought in behalf of herself and of others similarly situated, Rule 23 (a) (3), F. R. C. P., to enforce the liability of the defendant as the successor by merger of another corporation and a voluntary association which the plaintiff claims are liable on the debentures of Hydro-Electric System, on the theory that the latter was but the instrumentality of the former in issuing those debentures. As nothing now turns upon the facts on which such liability is based they will not be recited.

The complaint was dismissed because the court held that the debentures sued upon were not issued by a corporation within the meaning of §24 (1) of the Judicial Code, 28 U. S. C. A. §41 (1). Whether or not they were so issued is the sole question on this appeal.

For present purposes the following pertinent facts have been established. The plaintiff is a citizen of Florida and the defendant is a corporation organized and existing under the laws of New York. It maintains an office in that state within the Southern District. The debentures upon which the plaintiff has sued are bearer instruments which she owns and holds, not as the original owner and holder but as an assignee. No diversity of citizenship between the original holder and assignor of her debentures and the defendant has been shown.

The International Hydro-Electric System is a Massachusetts trust not chartered as a corporation but created and existing pursuant to a common law declaration of

trust dated March 25, 1929, under which it possesses many of the rights, powers, attributes and characteristics of a corporation. In addition to having an artificial name, by-laws, and a seal, it has an elected board of directors (except that the first board was designated by the trustees by vote of the shareholders). This board has and exercises broad powers much like those of the board of directors of a corporation. The System has shareholders who own the beneficial interest in the trust estate represented by shares of different classes, each having different rights, privileges, and preferences in respect to dividends and to payment in distribution upon dissolution and liquidation. Neither the trustees, the directors nor the shareholders have any personal liability, and dividends are declared on the shares by the board of directors as dividends are declared on corporate stock. Some of the shares carry voting rights, and certain actions can be taken only after a prescribed number of shares have so voted. An office must be maintained by the trust for the transfer of its shares, annual meetings of shareholders are held and the trust does not cease to exist upon the death of any trustee, director, or shareholder. It has filed a copy of the declaration of trust with the Massachusetts commissioner of corporations. It may sue and be sued in its own name and its property is subject to attachment and execution. It has been financed by the sale of its shares and debentures to the purchasing public through underwriters and its board of directors issues an annual report similar to that customarily issued by a corporate board of directors.

Decision turns upon whether the voluntary asociation just described falls within the phrase "any corporation" as used in the above mentioned statute, of which the pertinent part is now quoted:

> "No district court shall have cognizance of any suit * * * to recover upon any promissory note or other chose

in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

If to be a quasi-corporation is enough to bring this Massachusetts trust within the words "any corporation" in the statute the problem on this appeal is not very difficult, for we think the term "quasi-corporation" is broad enough to include Hydro System. *Malley* v. *Howard*, 1 Cir., 281 Fed. 363. See also, *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449. The real problem is to determine whether the statute is to be construed as if Congress had used the words "any corporation or quasi-corporation."

There is much force in the argument that an association like Hydro System which issues securities in much the same way as corporations do should be held to be a corporation in suits on those securities which are widely purchased and sold like corporate securities. And there is some support for the position that an association like a Massachusetts trust is to be generally considered a corporation. *State Street Trust Co.* v. *Hall*, 311 Mass. 299. It is to be so considered in special instances, of course, as for the purpose of applying a statute which defines "corporation" to include an association. *Hecht* v. *Malley*, 265 U. S. 144; *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110. See also, *Morrissey* v. *Commissioner*, 296 U. S. 344. As was explained in *Hemphill* v. *Orloff*, 277 U. S. 537, where it was held that a Massachusetts trust was lawfully required to fulfill the same conditions precedent to carrying on business in Michigan that foreign corporations had to meet, what a business entity is called is not decisive in determining what control may be exercised by a state over its activities. Its real

nature may be considered, and if it have and exercise the ordinary powers and attributes of a corporation it may be subjected to similar treatment. There was no doubt as to the intent of the Michigan legislature to include associations within the term "corporations" as used in the statute. Sec. 9071 of Michigan Compiled Laws, 1915, made that intent plain enough.

But cases like the above are not very helpful though they show special instances wherein Massachusetts trusts have been treated as though they were corporations. For other cases where such trusts have neither been so treated nor been called corporations see *Coolidge* v. *Old Colony Trust Co.*, 259 Mass. 515; *Larson* v. *Sylvester*, 282 Mass. 352, and *Peterson* v. *Hopson*, 306 Mass. 597. They do not certainly mark the way to decision on a question of federal jurisdiction, for how such an association as Hydro System has been dealt with under state law is not decisive. *Chicot County* v. *Sherwood*, 148 U. S. 529. The issue now presented is not whether such an association as Hydro System may be subjected to state control or taxation as a corporation where it engages in business activities. It is the wholly different one of the jurisdiction of a federal court over the subject matter of a particular action, and effect must be given to the well established rule that federal jurisdiction is not to be extended beyond the scope permitted by a strict construction of the statute upon which it rests. *Indianapolis* v. *Chase National Bank*, 314 U. S. 63; *Thomson* v. *Gaskill*, 315 U. S. 442. That much is required by a "due regard for the rightful independence of state governments." *Healy* v. *Ratta*, 292 U. S. 263, 270. We recognized this in *Central Mexico Light & Power Co.* v. *Munch*, 2 Cir., 116 F. (2) 85, and pointed out in *Zalkind* v. *Scheinman*, 2 Cir., 139 F. (2) 895, 903 that "we cannot shut our eyes to recent decisions [of the Supreme Court] manifesting a marked disposition not to enlarge but to reduce federal jurisdiction even where

considerable inconvenience to one of the parties may result." In the construction of this type of statute we are confronted with the antithesis of the situation which obtained in such cases as *Johnson* v. *United States,* 1 Cir., 163 F. 30, and *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381.

Because the amendment to the Judiciary Act in 1887 which put the words "any corporation" into this statute for the first time was made after the decision in Liverpool and *London Life Insurance Co.* v. *Oliver,* 10 Wall. 566, it is argued that the phrase "any corporation" should be construed to include a voluntary business association. It was there held that a business association operating "in a manner which requires corporate powers under legislative sanction" in a jurisdiction foreign to the one from which it derived those powers could be taxed as a corporation in such foreign jurisdiction, and the court said, "We have no hesitation in holding that, as the law of corporations is understood in this country, the Association is a Corporation * * * ." But this language was directed to the issue presented and decided in that case and cannot be taken to mean that "any corporation" includes an incorporated association generally. Where Congress has meant to enlarge the statutory meaning of "corporation" beyond its ordinary meaning it has done so by express definition as in the Bankruptcy Act, 11 U. S. C. A. §1 (8); the Federal Trade Commission Act, 15 U. S. C. A. §44; the Internal Revenue Code, 26 U. S. C. A. §3797 (3); and the Federal Power Act, 16 U. S. C. A. §796 (3).

If and when Congress desires to have the term "any corporation" in the Judicial Code include an association like the Massachusetts trust in this case, a simple amendment is all that will be required. Meanwhile it is not for us to undertake to enlarge by construction an exception in a statute restricting federal jurisdiction. Compare, *Burgoyne*

v. *James*, 156 Misc. 859, affirmed 246 App. Div. 605. Though we think it doubtful that the use of "any" instead of "a" before "corporation" may be taken as indicative of anything, its presence may perhaps be adequately explained on the theory that Congress meant to include what are commonly known as public corporations as well as private corporations. It has been held that they are included. *Scott County, Ark.* v. *Advance-Rumley Thresher Co.*, 8 Cir., 288 Fed. 739; *Bloomfield Village Drain District* v. *Keefe*, 6 Cir., 119 Fed. (2) 157. Yet this statute was enacted to limit federal jurisdiction, *Wilson* v. *Knox County, C.C.*, 43 Fed. 481, and should be strictly construed to accomplish that end.

Affirmed.

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INTERNATIONAL PAPER COMPANY.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF OF INTERNATIONAL PAPER COMPANY IN OPPOSITION

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Attorney for Defendant
International Paper Company.

New York, October 11 1945.

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BRIEF OF INTERNATIONAL PAPER COMPANY IN OPPOSITION

Opinions Below

The opinion of the District Court for the Southern District of New York (R 35-9) is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R 50) is reported in 149 F (2d) 911.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 28 1945 (R 55). The petition for a writ of certiorari was filed September 27 1945. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the act of February 13 1925.

Question Presented

Is a Massachusetts trust, formed by declaration of trust pursuant to the common law but having most of the

attributes of a corporation formed pursuant to statute, a "corporation" within the meaning of the "assignee clause" (Judicial Code § 24) limiting the jurisdiction of the District Courts of the United States?

Statute Involved

Judicial Code § 24, 28 USC § 41, provides in part:

> "*Original jurisdiction.* The district courts shall have original jurisdiction as follows:
>
> (1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment has been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section." (Underscoring supplied)

The sentence underlined in this quotation is the so-called "assignee clause". The words "if such instrument be payable to bearer and be not made by any corporation", were inserted by the act of March 3 1887, 24 Stat. 552.

Statement

The sole question tendered by the petition is the scope of jurisdiction of the Federal courts. Jurisdiction is predicated by the complaint upon diversity of citizenship, the petitioner being a citizen of Florida and the defendant a New York corporation (R 8-10). The suit is upon bearer instruments (not foreign bills of exchange) of which petitioner is a subsequent holder (R 21). Petitioner does not claim that diversity of citizenship existed between the defendant and the original holder of the instruments in suit (petition p. 2). The record affirmatively shows that there was no diversity of citizenship between defendant and the original holders of the entire issue of debentures involved, since those original holders were all New York corporations (R 22-5).

The application for certiorari is predicated upon the contention that International Hydro-Electric System, a Massachusetts trust, is as a matter of law a "corporation" within the meaning of the jurisdictional statute, in that "while not chartered as a corporation" (petition p. 2), it is a quasi-corporation.

Argument

1. *The canons of construction uniformly applied on questions of Federal jurisdiction forbid judicial extension of that jurisdiction to a quasi-corporation.*

The Second Circuit Court of Appeals rightly concluded that the strict construction of their statutory jurisdiction

by the Federal courts forbids the inclusion of quasi-corporations with corporations in the class of entities whose securities in bearer form may be made the subject of suit in the Federal courts without the showing of original diversity of citizenship. To call the International Hydro-Electric System a quasi-corporation is to say that it is *not* a corporation, although similar to one. This Court said in *School District* v. *Insurance Company*, 103 US 707, 708:

> "What is meant by the words '*quasi* corporation,' as used in the authorities, is not always very clear. It is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special."

The word "quasi", which literally means "as if", is defined in Bouvier (Rawle's 3rd Revision, Vol. 3, p. 2780) as follows:

> "A term used to mark a resemblance, and which supposes a difference between two objects. Dig. 11. 7. 1. 8. 1. . . . It is exclusively a term of classification. Prefixed to a term of Roman law, it implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It negatives the idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other; Maine, Anc. Law 332."

That the characterization of the International Hydro-Electric System as a quasi-corporation is as far as petitioner could possibly go in assimilating it to the statutory term "corporation", is clear from the Massachusetts cases

to which the Court of Appeals calls attention (149 F [2d] at 913; R 53), distinguishing business trusts from corporations. In *Coolidge* v. *Old Colony Trust Co.*, 295 Mass. 515, for instance, the Massachusetts court said:

> "Such a trust is not a corporation and it is not organized under the laws of this Commonwealth."

To the same effect are 8 Thompson on Corporations § 6736; 3 Cook on Corporations p. 2249.

Under these circumstances, the canons of construction with respect to jurisdiction which this Court has often and indeed recently laid down, forbid the extension of the statutory term "corporation" to include Massachusetts trusts. For the rule of strict construction we may merely refer to *Indianapolis* v. *Chase National Bank*, 314 US 63, 76-7; *Thomson* v. *Gaskill*, 315 US 442, 446; *Healy* v. *Ratta*, 292 US 263, 270.

2. There is no diversity among the Circuit Courts on this question.

While the foregoing considerations are in our submission controlling, petitioner bases her principal argument upon the contention that the holding of the Second Circuit Court of Appeals herein conflicts with the decision of the Eighth Circuit Court of Appeals in *Scott County* v. *Advance-Rumley Thresher Co.*, 288 Fed. 739, and that of the Sixth Circuit Court of Appeals in *Bloomfield Village Drain District* v. *Keefe*, 119 F (2d) 157. It does not appear that application for certiorari was made in either case.

In reality neither case is authority for petitioner's contention here. Both involved juridical entities created pursuant to statute of the State. The *Scott County* case was

an action on bearer warrants of an Arkansas county, of which warrants plaintiff was the assignee. As against the defendant county's contention that it was not a corporation because an act of the Arkansas legislature passed in 1879 had repealed Arkansas statutes "making counties corporations. . .", the Eighth Circuit Court of Appeals noted that counties as a matter of general law are public corporations and that the act of 1879 had not changed the essential character of the entities previously recognized to be corporations (288 Fed. at 743, 744). In the *Bloomfield* case there were involved bearer bonds of drain districts created under the statutes of Michigan for agricultural purposes. While the Michigan constitution and statutes did not (as did the Arkansas law prior to 1879) actually denominate the entity involved as a corporation, the Sixth Circuit Court of Appeals found upon the reasoning of cases cited in its opinion (119 F [2d] at 161) that "a drain district exhibits the essential characteristics of a public corporation". It then dismissed the action on another ground.

Thus neither of these cases rises to the level of creating a conflict with the decision of the Second Circuit Court of Appeals herein.

3. Under the rule of strict construction, controlling effect attaches to the fact that Congress has in various statutes explicitly enlarged the term "corporation" when it wished to include therein entities like business trusts.

The phrase "any corporation" in Judicial Code § 24 has stood unchanged in that act since 1887 although the section has been from time to time amended, the last time in 1940. When, however, Congress wished to enlarge the concept of "corporation" to be applied in various statutes,

it has found no difficulty in doing so. Although the Bankruptcy Act of 1898, c. 541 § 1, 30 Stat. 544, contained a broad definition of the term "corporation", nevertheless in 1926 Congress added the following (Act of May 27 1926, c. 406, § 1, 44 Stat. 662):

> ". . . joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

The Internal Revenue Code, 26 U S C § 3797 (3), defines the term "corporation" when used in that Code as including associations, joint-stock companies, and insurance companies.

The Federal Trade Commission Act, having originally defined "corporation" as meaning "any company or association incorporated or unincorporated . . ." (Act of September 26 1914, c. 311, § 4, 38 Stat. 719), was amended in 1938 to include within that definition "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated . . ." (Act of March 21 1938, c. 49 § 2, 52 Stat. 111; 15 USC § 44).

"Corporation" is defined for purposes of the Federal Power Act to mean "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing . . ." (Act of June 10 1920, c. 285 § 3, 41 Stat. 1063, as amended by Act of August 26 1935, c. 1935, c. 687, Title II, § 201, 49 Stat. 838; 16 U S C § 796 [3]).

The Act of June 25 1938 (c. 676, 52 Stat. 1060), known as the Fair Labor Standards Act, in its definition of "person" provides in § 3 (29 U S C § 203[a]):

> " 'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."

The Second Circuit Court of Appeals naturally gave decisive importance to this settled course of Congressional treatment of the term "corporation" (149 F [2d] at 913; R 54). Petitioner's attempt to dispose of this course of treatment by urging that the failure of Congress similarly to amend the "assignee clause" shows an intention to leave to judicial construction the word "corporation" therein, and also shows the satisfaction of Congress with the decisions of the Sixth and Eighth Circuit Courts of Appeals as petitioner interprets them (brief pp. 11-2), is so obviously groundless as to require no discussion.

Conclusion

The decision of the Second Circuit Court of Appeals herein clearly accords with the statutory limitation imposed by Congress upon the jurisdiction of the Federal courts, and does not call for review in this Court. Petitioner's claim that the Massachusetts trust of which she holds debentures, is an "instrumentality" of the defendant, must under the rule of *Erie R. Co.* v. *Tompkins* be determined according to New York law in any event. It should be determined by the courts of New York.

Respectfully submitted,

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New York, October 11 1945.